

IN THE HIGH COURT OF JUDICATURE AT BOMBAY

ORDINARY ORIGINAL CIVIL JURISDICTION

ARBITRATION APPLICATION NO. 108 OF 2015

M/s. Anacon Process Control Pvt. Ltd

...Applicant

Vs.

Gammon India Limited.

...Respondent

Mr. Navid Y. Memon, for Applicant.

Mr. Rashmin Khandekar with Ms. Jinal Gogri i/by M/s. Negandhi Shah and Himayatullah, for Respondent.

CORAM: S.J. KATHAWALLA, J.**DATE: 22nd December, 2016****P.C.:**

1. The Applicant -- M/s. Anacon Process Control Pvt. Ltd. has filed the above Arbitration Application under Section 11 of the Arbitration and Conciliation Act, 1996 ("the Act"), seeking appointment of an Arbitrator to adjudicate the disputes and claims arising out of the three sub-contracts dated 7th August, 2006, 25th May, 2007 and 23rd October, 2007 between the Applicant and the Respondent -- Gammon India Limited.

2. The brief facts of the matter are as under :

2.1 The Applicant is a Private Limited Company engaged in the business of design, supply and installation related to electrical and instrumentation work. The Respondent is a Public Limited Company carrying on the business of executing engineering, infrastructure and construction projects.

2.2 The Applicant and the Respondent had entered into three Sub-contracts dated 7th August 2006, 25th May 2007 and 23rd October 2007. The Respondent had, thereafter, in terms of the said Sub-contracts, issued three Work Orders viz. WO No. 8501/14 dated 7th August 2006; WO NO. 8501/35 dated 25th May 2007; and WO No. 8516/28 dated 23rd October 2007 in favour of the Applicant for execution of electrical and instrumentation work in terms of the said Work Orders for the Numaligarh Siliguri Pipeline Project (NSPL) and the Project at Neyveli Lignite Thermal Power Plant, Barsingar, Bikaner, Rajasthan. Each of the said Sub Contracts had an identical arbitration clause. For convenience, the arbitration clause contained in the said Sub-Contracts is reproduced herein below:

“20.2 All decisions/matters shall be subject to the right of Arbitration as per Indian Arbitration and Conciliation Act, 1996 or any amendment thereof. The arbitration shall be before a Sole Arbitrator not connected with the works appointed by the Managing Director of the Contractor and the place of arbitration shall be Mumbai. The award of the Sole Arbitrator shall be final and binding on both parties.”

2.3 The Applicant raised various Running Account Bills upon the Respondent Company, some of which were disputed by the Respondent. As such, disputes arose with respect to payment to be made under the said invoices/Running Account Bills. In spite of the disputes having arisen between

the parties there was no invocation of arbitration in terms of the Arbitration Clause.

2.4 Instead of invoking arbitration as contemplated and mandated by the aforesaid clause contained in the Sub-Contracts, the Applicant on 11th April, 2014 sent a winding up notice under section 433 and 434 of the Companies Act, 1956. The relevant paragraph of the said Notice is reproduced herein below;

“In the circumstances, we are instructed by our clients to call upon you, which we hereby do and request you to pay the outstanding balance sum of Rs.48,44,753.00 (Rupees Forty Eight Lacs Forty Four Thousand Seven Hundred Fifty Three only) alongwith interest thereon @ 18% p.a. from 11/01/2012 till date aggregating to Rs.70,45,238.00 (Rupees Seventy Lacs Forty Five Thousand Two Hundred Thirty Eight Only) within 15 days from the receipt of this notice. By your not paying the said dues our client shall be constrained to initiate and lodge appropriate proceedings including filing winding up proceedings against your Company under Section 434 of the Companies Act, 1956 entirely at your risk as to the costs and consequences thereof, which you may please note.”

2.5 Thus there was no invocation of the arbitration clause by the Applicant, who subsequently, filed a Summary Suit against the Respondent being Summary Suit No. 1384/2014 before the City Civil Court at Mumbai for recovery of an amount of Rs.48,44,753/- along with interest @ 18% per annum.

2.6 In the said Summary Suit, the Respondent took out a Notice of Motion being Notice of Motion No. 3875 of 2014 under Section 8 of the Arbitration and Conciliation Act, 1996 (hereinafter referred to as “**the Act**”) for referring the parties to arbitration in terms of Clause 20.2 as set out above.

2.7 The City Civil Court vide order dated 9th December 2014 allowed the said Notice of Motion in terms of prayer clauses (a) and (b) which are reproduced hereunder;

“(a) That this Hon’ble Court declare that the substance of the disputes in the present Suit is the subject matter of an arbitration agreement;
(b) That this Hon’ble Court direct the parties herein to refer their disputes in the present Suit to arbitration in terms of arbitration clause and the Arbitration and Conciliation Act, 1996;” (Emphasis supplied).

The operative part of the said order, by which the Notice of Motion was disposed off is reproduced hereunder:

“7. In the light of above legal position, I do not find any legal hurdle to conclude that this Court has no jurisdiction to try the suit in view of the specific and unambiguous arbitration clause in the agreement between the parties from which the suit claim springs. Resultantly, the Notice of Motion is made absolute in terms of Clause (a) and (b). In result thereof the suit is disposed off. Parties may appear before the Arbitrator to be appointed by them.”

2.8 Instead of complying with the terms of the Arbitration Clause and/or with the order dated 9th December 2014, the Applicant through their Advocates addressed a letter dated 6th February 2015 to the Respondent appointing Mr. Justice A. D. Mane (Retd.) as the Arbitrator. The said letters despite there being no invocation from the Applicant also stated that pursuant to the winding up notice dated 11th April, 2014, the Respondent ought to have referred the matter to arbitration.

2.9 In reply to the said letter, the Respondent vide their Advocates' letter dated 7th March 2015 pointed out that under the Arbitration Clause, the arbitration was required to be before a Sole Arbitrator to be appointed by the Managing Director ("M.D.") of the Respondent and that not a single request was made by the Applicant to the M.D. of the Respondent for appointing a Sole Arbitrator to adjudicate upon the Applicant's alleged claim. It was further pointed out that in the circumstances, the question of the M.D. of the Respondent waiving the right to appoint an Arbitrator and/or of the Applicant nominating an Arbitrator, did not arise. The procedure as contemplated under the arbitration clause was not followed by the Applicant at all.

2.10 The Applicants have now filed the present Arbitration Application under Section 11(6) of the Arbitration and Conciliation Act, 1996 for appointment of an arbitrator for adjudicating the disputes between the parties.

3. The Learned Advocate appearing for the Applicant has submitted that though the order passed by the City Civil Court dated 9th December, 2014, directed the parties to appear before the Arbitrator to be appointed by them, the Respondent deliberately avoided/failed to appoint the sole Arbitrator for a period of about two months thereafter, by exercising the right retained by the Managing Director of the Respondent. It is for this reason that the Applicant through their Advocates wrote a letter dated 6th February, 2015, informing the Respondent that it is clear that the Respondent is not interested in settlement of disputes by arbitration as they have failed to exercise the right to appoint the Arbitrator, with a mala fide intention to delay the payments towards the outstanding dues and that therefore the Respondent has waived their right of nomination of Arbitrator as the Respondent had not acted as per the arbitration clause.

4. It is submitted on behalf of the Applicant that the City Civil Court at Mumbai by the said order in the Notice of Motion taken out by the Respondent under Section 8 of the Act rightly referred the dispute between the parties to Arbitration and further directed the parties to appear before the Arbitrator to be appointed by them. However, despite being directed by the said order to appoint the Arbitrator, the Respondent failed to appoint the Arbitrator and has therefore forfeited the right to appoint the sole Arbitrator by their conduct. In support of its contention that the City Civil Court is empowered to direct the parties to appoint an Arbitrator as per the arbitration clause, while disposing off

an application under Section 8 of the Act, the Applicant has relied on the decision of the Hon'ble Supreme Court dated 29th August, 2007 in the case of *Bharat Sewa Sansthan vs. U.P. Electronics Corporation Limited*¹. It is therefore submitted on behalf of the Applicant that the above Application be allowed.

5. The learned Advocate appearing for the Respondent has submitted as follows:

5.1 The said application has been filed by the Applicant without invocation of the arbitration clause and without exhausting the procedure as contained in the arbitration clause.

5.2 That the Applicant is wrong in its contention made at the time of the hearing of the Application that the order dated 9th December, 2014 and/or the Notice of Motion filed by the Respondent seeking reference to arbitration amounted to an invocation under Section 21 of the Act.

5.3 That the application made under Section 8 of the Act or any Order passed thereunder does not mean that the Applicant has thereby invoked arbitration in terms of Section 21 of the Act, which is a *sine qua non* for commencement of the arbitration proceedings. In support of its contention, the Respondent has relied on the following decisions:

(i) *State of Goa vs. Praveen Enterprises*²;

(ii) *Narayan Prasad Jalan v. Chetan P. S. Chauhan & Anr.*³;

¹ AIR 2007 SC 2961

² (2012) 12SCC 581

³ AIR 2006 Del. 8: 2005 SCC Online Del 868

(iii) *Cash and Gain Finance and Investments v. Manjula Udaya Shankar*⁴

5.4 That the procedure agreed between the parties for appointing an Arbitrator cannot be departed from as held by the Hon'ble Supreme Court in the following decisions:

(i) *Iron & Steel Co. Ltd. vs. Tiwari Road Lines*⁵

(ii) *Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff and Widmann A.G. v. MCGM & Anr.*⁶

(iii) *Standard Corrosion Controls Pvt. Ltd. v. Sarku Engineering Services SDN BHD*⁷

5.5 That if notice invoking arbitration is not in accordance with the arbitration agreement and is defective, an Application under Section 11 of the Act based on such notice is not maintainable, as held in *Arohi Infrastructure Pvt. Ltd v. Tata Capital Financial Services Ltd.*⁸

6. I have perused the Application, the affidavit-in-reply filed by the Respondent and have considered the oral as well as written submissions advanced on behalf of the parties and also the case law relied upon by them.

⁴ (2009) 1 Arb. L.R. 576 (Mad.): 2008 SCC Online Mad 802

⁵(2007) 5 SCC 703

⁶(2015) 3 SCC 800

⁷ AIR 2009 SC 1138.

⁸ Bom. High Court - Arbitration Application (L) No. 1360 of 2015 - Unreported]:

7. Admittedly, the Applicant and the Respondent had entered into three sub-contracts dated 7th August, 2006, 25th May, 2007 and 23rd October, 2007. Each of the said sub-contracts had an arbitration clause i.e. clause 20.2, which is reproduced in paragraph 2.2 above.

8. Admittedly disputes arose between the parties. However, there was no invocation of arbitration in terms of the arbitration clause. Instead of invoking the arbitration as contemplated and mandated by clause 20.2 of the sub-contracts, the Applicant on 11th April, 2014 sent a winding up notice under Sections 433 and 434 of the Companies Act, 1956, to the Respondent. Even thereafter the Applicant did not invoke the said arbitration clause and instead filed a Summary Suit against the Respondent being Summary Suit No. 1384 of 2014 before the City Civil Court at Mumbai for recovery of an amount of Rs. 48,44,753/- along with interest at the rate of 18 per cent per annum. In the said Summary Suit, the Respondent took out a Notice of Motion being Notice of Motion No. 3875 of 2014 under Section 8 of the Act for referring the parties to arbitration in terms of Clause 20.2 set out above. The City Civil Court vide an order dated 9th December, 2014 allowed the said Notice of Motion in terms of prayer clauses (a) and (b), which clauses, along with the operative part of the order, even at the cost of repetition, are again set out hereunder:

“(a) That this Hon’ble Court declare that the substance of the disputes in the present Suit is the subject matter of an arbitration agreement;

(b) That this Hon'ble Court direct the parties herein to refer their disputes in the present Suit to arbitration in terms of arbitration clause and the Arbitration and Conciliation Act, 1996;” (Emphasis supplied).

Operative part of the order:

“7. In the light of above legal position, I do not find any legal hurdle to conclude that this Court has no jurisdiction to try the suit in view of the specific and unambiguous arbitration clause in the agreement between the parties from which the suit claim springs. Resultantly, the Notice of Motion is made absolute in terms of Clause (a) and (b). In result thereof the suit is disposed off. Parties may appear before the Arbitrator to be appointed by them.”

9. From prayer clauses (a) and (b) above, which are granted by the Learned Judge of the City Civil Court, it is clear that the Court has held that the disputes which form the subject matter of the Summary Suit, are in fact the subject matter of an Arbitration Agreement and therefore directed the parties to refer their disputes to arbitration in terms of the arbitration clause.

10. Again, in the operative order, when the Learned Judge states that the parties may appear before the Arbitrator to be appointed by them, it has to be read and understood in the context of the direction given by the Learned Judge in terms of prayer clause (b) above viz. that the parties may appear before the Arbitrator to be appointed by them in terms of the arbitration clause and the Act.

11. Section 8 (1) and Section 21 of the Act read thus:

"8. Power to refer parties to arbitration where there is an arbitration agreement.- (1) A judicial authority, before which an action is brought in a matter which is the subject of an arbitration agreement shall, if a party to the arbitration agreement or any person claiming through or under him, so applies not later than the date of submitting his first statement on the substance of the dispute, then, notwithstanding any judgment, decree or order of the Supreme Court or any Court, refer the parties to arbitration unless it finds that prima facie no valid arbitration agreement exists."

"21. Commencement of arbitral proceedings.- Unless otherwise agreed by the parties, the arbitral proceedings in respect of a particular dispute commence on the date on which a request for that dispute to be referred to arbitration is received by the respondent."

12. A party to an Arbitration Agreement is bound to invoke arbitration in terms of Section 21 of the Act which is *sine qua non* for commencement of the arbitration proceedings. An Application made under Section 8 of the Act or any order passed thereunder does not mean that the Applicant has thereby invoked arbitration in terms of Section 21 of the Act. Sections 21 and 8 of the Act completely operate in different spheres. This is very clearly explained by the Hon'ble Supreme Court in its judgment in *State of Goa vs. Praveen*

Enterprises (supra), the relevant paragraphs of which are reproduced hereunder:

"13. "Reference to arbitration" can be in respect of reference of disputes between the parties to arbitration, or may simply mean referring the parties to arbitration. Section 8 of the Act is an example of referring the parties to arbitration. While Section 11 contemplates appointment of arbitrator [vide sub-sections (4), (5) and (9)] or taking necessary measure as per the appointment procedure under the arbitration agreement [vide sub-section (6)], Section 8 of the Act does not provide for appointment of an arbitrator, nor referring of any disputes to arbitration, but merely requires the judicial authority before whom an action is brought in a matter in regard to which there is an arbitration agreement, to refer the parties to arbitration. When the judicial authority finds that the subject matter of the suit is covered by a valid arbitration agreement between the parties to the suit, it will refer the parties to arbitration, by refusing to decide the action brought before it and leaving it to the parties to have recourse to their remedies by arbitration.

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18. In view of Section 21 of the Act providing that the arbitration proceedings shall be deemed to commence on the date on which "a request for that dispute to be referred to arbitration is received by the respondent" the said confusion is cleared. Therefore, the purpose of Section 21 of the Act is to determine the date of commencement of the arbitration

proceedings, relevant mainly for deciding whether the claims of the Claimant are barred by limitation or not. (emphasis supplied)

13. That the expression 'refer the parties to arbitration' or 'referring the parties to arbitration' cannot amount to constitution of an Arbitral Tribunal is explained by the Delhi High Court in the decision in *Narayan Prasad Jalan v. Chetan P. S. Chauhan & Anr.*, (*supra*), paragraph 8 of which is reproduced hereunder:

"8. The expression 'refer the parties to arbitration' appearing in sub-section (1) of Section 8 of the Act necessarily means that the Court if satisfied that the action which has been brought in a matter is the subject of an arbitration agreement, will ask the parties to have their disputes resolved by the agreed mode of arbitration and not by resorting to the jurisdiction of the ordinary Civil Courts set up for adjudication of the rights of the parties. This interpretation stands fortified from the definition of "reference" appearing in Section 2(e) of the Act which means 'a reference to arbitration'. The word "arbitration" and "arbitral tribunal" are distinct and have different meaning. It is, therefore, manifest that "referring the parties to arbitration" cannot amount to constitution of an arbitral tribunal. In the opinion of this Court, once a judicial authority under Section 8(1) of the Act refer the parties to arbitration, the suit or the other proceedings comes to an end before the said Judicial Authority and it becomes functus officio after referring the parties to arbitration. After referring

the party to arbitration, it is open to the interested parties to take recourse for settlement of his dispute through the alternative mode of arbitration and to seek constitution of arbitral tribunal in terms of the provisions of Section 11 of the Act. (emphasis supplied)

14. Again, in the decision of the Madras High Court in the case of *Cash and Gain Finance and Investments v. Manjula Udaya Shankar (supra)*, it is categorically held that if at all Section 21 must be applied, it must be applied and given full expression only from the time a request is made subsequent to the order of the Court under Section 8 of the Act directing the parties to arbitration. The relevant portion of the Judgment is reproduced hereunder:

“13. ... the provisions (Section 8 and 21) operate under two distinct circumstances. An application filed under Section 8 is not an application that is contemplated under Section 21 at all. Section 8 is a petition before the Court where a suit is pending and where the court is bound to pass an order. Section 21 contemplates that the arbitral proceedings in respect of a particular dispute commences when a request for a reference is received by the Respondent”

“16 A petition under Section 8 is not a request to the party. If at all Section 21 must be applied, it must be applied and given full expression only from the time a request is made subsequent to the order of the Court under section 8 directing the parties to arbitration.” (emphasis supplied)

15. Therefore, neither the order dated 9th December, 2014 nor the Notice of Motion filed by the Respondent seeking reference to Arbitration would

amount to an invocation under Section 21 of the said Act. The Applicant cannot be heard to say that after the order passed by the City Civil Court, the Respondent ought to have constituted an Arbitral Tribunal, despite there being no invocation from the Applicant and that the Respondent by not doing so, has forfeited the right to appoint an Arbitrator and the Applicant admittedly not having invoked the arbitration clause is entitled to file the present Application under Section 11 of the Act.

16. It is trite that the procedure agreed upon between the parties for appointing an arbitrator has to be adhered to and should not be departed from. The Hon'ble Supreme Court in the case of *Iron & Steel Co. Ltd. vs. Tiwari Road Lines (supra)* has, inter alia, observed that in the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators should be placed on a high pedestal and has to be given preference over any other mode for securing appointment of an Arbitrator. Paragraphs 9, 10 and 11 of the said judgment are reproduced hereunder:

"9. The legislative scheme of Section 11 is very clear. If the parties have agreed on a procedure for appointing the arbitrator or arbitrators as contemplated by sub-section (2) thereof, then the dispute between the parties has to be decided in accordance with the said procedure and recourse to the Chief Justice or his designate cannot be taken straightaway. A party can approach the Chief Justice or his designate only if the parties have not agreed on a procedure

for appointing the arbitrator as contemplated by sub-section (2) of Section 11 of the Act or the various contingencies provided for in sub-section (6) have arisen. Since the parties here had agreed on a procedure for appointing an arbitrator for settling the dispute by arbitration as contemplated by sub-section (2) and there is no allegation that any one of the contingencies enumerated in clause (a) or (b) or (c) of sub-section (6) had arisen, the application moved by the respondent herein to the City Civil Court, Hyderabad, was clearly not maintainable and the said court had no jurisdiction to entertain such an application and pass any order. The order dated 27.12.2004, therefore, is not sustainable.

10. In the matter of settlement of dispute by arbitration, the agreement executed by the parties has to be given great importance and an agreed procedure for appointing the arbitrators has been placed on high pedestal and has to be given preference to any other mode for securing appointment of an arbitrator. It is for this reason that in clause (a) of sub-section (8) of Section 11 of the Act it is specifically provided that the Chief Justice or the person or institution designated by him, in appointing an arbitrator, shall have due regard to any qualifications required of the arbitrator by the agreement of the parties.

11. The judicial pronouncements also show that normally the clause in the agreement providing for settling the dispute by arbitration by arbitrators having certain qualifications or in certain agreed manner should be adhered to and should not

be departed with unless there are strong grounds for doing so.... (emphasis supplied)".

17. In the case of *Walter Bau AG, Legal Successor, of the Original Contractor, Dyckerhoff and Widmann A.G. v. MCGM & Anr. (supra)*, the Hon'ble Supreme Court has again laid emphasis that the agreed upon procedure between the parties has to be complied by them failing which the appointment of an Arbitrator is clearly invalid in law. Paragraph 10 of the said decision is reproduced hereunder:

"10. Unless the appointment of the arbitrator is ex facie valid and such appointment satisfies the Court exercising jurisdiction under Section 11(6) of the Arbitration Act, acceptance of such appointment as a fait accompli to debar the jurisdiction under Section 11(6) cannot be countenanced in law. In the present case, the agreed upon procedure between the parties contemplated the appointment of the Arbitrator by the second party within 30 days of receipt of notice from the first party. While decision in Datar Switchgears Ltd., may have introduced some flexibility in the time frame agreed upon by the parties by extending it till a point of time anterior to the filing of the application under Section 11(6) of the Arbitration Act, it cannot be lost sight of that in the present case the appointment of Shri Justice A.D. Mane is clearly contrary to the provisions of the rules governing the appointment of Arbitrators by ICADR, which the parties agreed to abide by in the matter of such appointment. The option given to the Respondent Corporation to go beyond the panel submitted by ICADR and to appoint any

person of its choice was clearly not in the contemplation of the parties. If that be so, obviously, the appointment of Shri Justice A.D. Mane is non est in law. Such an appointment, therefore, will not inhibit the exercise of jurisdiction by this Court under Section 11(6) of the Arbitration Act. It cannot, therefore, be held that the present proceedings is not maintainable in law. The appointment of Shri A.D. Mane made beyond 30 days of the receipt of notice by the Petitioner, though may appear to be in conformity with the law laid down in Datar Switchears Ltd., is clearly contrary to the agreed procedure which required the appointment made by the Respondent Corporation to be from the panel submitted by ICADR. The said appointment, therefore, is clearly invalid in law."

18. Again in *Standard Corrosion Controls Pvt. Ltd. v. Sarku Engineering Services SDN BHD* (supra), the Hon'ble Supreme Court has observed thus:

"10. Learned Counsel for the Applicant submitted that the arbitration clause of the ICC cannot prevail over the parliamentary law, which is the Arbitration and Conciliation Act, 1996. In my opinion it is true that a statute overrides the contract, but it has been noticed that Section 11(2) of the Act states that subject to Sub-Section 6, the parties are free to agree on a procedure for appointing the Arbitrator or Arbitrators. Admittedly, the conditions mentioned in Sub-Section 6 of Section 11 are not attracted in this case. Hence, the procedure to appoint an Arbitrator agreed upon by the parties will be applicable. [emphasis supplied]

11. As already stated above, the parties had agreed that any dispute between them shall be settled as far as possible by mutual consultation and consent, failing which by arbitration to be held at Mumbai applying the arbitration rules of the ICC. In my opinion, the Applicant has to apply to the Secretariat of the ICC, as mentioned in the arbitration rules of the ICC and it cannot approach this Court for appointment of an Arbitrator. No doubt, the arbitration will have to be held at Mumbai, but the entire procedure of appointment of the Arbitrator has to be in accordance with the arbitration rules of the ICC, which requires that first a request has to be made to the Secretariat of the ICC. Admittedly, the Applicant has not approached the ICC Secretariat. Hence in my opinion the application filed by the Applicant herein, is not maintainable at all. [emphasis supplied]"

19. It is also trite that if notice invoking arbitration is itself not in accordance with the arbitration agreement and is therefore defective, an Application under Section 11 of the act filed on the basis of such defective notice which is mandatory before filing Application under Section 11 is not maintainable. In *Arohi Infrastructure Pvt. Ltd v. Tata Capital Financial Services Ltd. (supra)* , this Court has held as under:

" 49. In my view, Mr. Khandeparkar, learned counsel appearing for the respondent is right in his submission that the application even otherwise was not maintainable on the ground that the notice dated 16th June, 2015 issued by the applicants was a defective notice. In any view, since the

right to appoint an arbitrator solely vested in the respondent, the applicants at the first instance could not have suggested any names of proposed arbitrators in the said notice. The said notice itself was not in accordance with the arbitration agreement and was defective. The present arbitration application based on such defective notice which notice was mandatory before filing the application under Section 11, the present arbitration application is not maintainable even on that ground. There was thus no default on the part of the respondent in appointing any arbitrator. In my view, the arbitration application is totally devoid of merits and is accordingly dismissed. No order as to costs.” [emphasis supplied]

20. In the circumstances, in the present case the Applicant has admittedly not issued any notice invoking the arbitration. The Applicant has taken an incorrect stand that pursuant to the order dated 9th December, 2014 of the City Civil Court, it is the Respondent who ought to have constituted the Arbitral Tribunal and having failed to do so, has forfeited its right to appoint an Arbitrator. The Applicant has therefore not followed the prescribed procedure i.e. invoking the arbitration clause under Section 21 of the Act and has filed the present application without following the agreed procedure. In view thereof, the Application under Section 11 of the Act is not maintainable. The Applicant has sought to contend that in the case of *Bharat SewaSansthan vs. U.P. Electronics Corporation Limited* (supra), the Hon'ble Supreme Court has, whilst disposing of a Notice of Motion under Section 8 of the Act, approved

the action of the High Court namely to direct the parties to appear before the Arbitrator. However, on a reading of the Judgment it is noted that the parties in the said decision have not raised such an issue before the Hon'ble Supreme Court and thus, such a ratio cannot be attributed or read into the said judgment. The above Arbitration Application is therefore dismissed as not maintainable.

(S.J. KATHAWALLA, J.)